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SENATE

{ REPORT
No. 1912 }

FOOD SERVICE OF EVANSVILLE, INCORPORATED

JUNE 27, 1952.—Ordered to be printed

Mr. McCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 2405]

The Committee on the Judiciary, to which was referred the bill (H. R. 2405) for the relief of Food Service of Evansville, Inc., having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to pay the sum of \$11,317.27 to Food Service of Evansville, Inc., of Evansville, Ind., in full settlement of all claims against the United States for losses sustained as a result of an agreement with officers at Camp Breckinridge, Ky., to furnish equipment and supplies in the post exchanges at Camp Breckinridge, Ky.

STATEMENT

On July 24, 1950, Camp Breckinridge, Ky., was reactivated by the Department of the Army as a training installation. On August 24, 1950, the Camp Breckinridge post exchange began operations.

Between those dates (specifically, August 7, 1950) Maj. Laurance M. Fath reported to the commanding officer at Camp Breckinridge and was assigned to duty as the post exchange officer. One of his first duties as post exchange officer was to hire a staff to assist him and to consider a number of applications for concessions in the post exchange. On August 5, 1950, Mr. William S. O'Nan, of Morganfield, Ky., an agent for Food Service of Evansville, Inc., submitted a bid to the post exchange officer at Camp Breckinridge requesting the sandwich concession for the various facilities at the post. Again, on

August 10, 1950, Mr. O'Nan wrote to Major Fath submitting a bid to sell "radar sandwiches" to the post exchange at Camp Breckinridge and offering to furnish the first four sandwich machines to the post exchange without charge and to furnish the remaining machines at wholesale price.

During the month of August a sandwich machine was installed in the main exchange building at Camp Breckinridge by the agent of Food Service of Evansville, Inc., for the purpose of dispensing hot sandwiches. The corporation furnished sandwiches to the Camp Breckinridge post exchange beginning on August 24, 1950. The sandwiches were paid for by purchase orders on Chicago regional office of the Army and Air Force Exchange Service and the purchase orders were executed by Major Fath.

It is not entirely clear from the evidence before the committee whether the service of Food Service of Evansville, Inc., was concluded on October 18, 1950, or November 17, 1950. The affidavit of the president of Food Service of Evansville, Inc., contains a statement indicating that the service was concluded on October 18; however, the report of the Department of the Army submitted to the House of Representatives in connection with this claim states that the date was the 17th of November 1950. There is further dispute as to whether this conclusion of service was terminated by abrupt notification by Major Fath to the claimant that the services were no longer required. The affidavit of the president of Food Service of Evansville, Inc., states that he was notified on October 18, 1950, that his product and service were no longer required as of that date. In the hearing on this legislation in the House of Representatives Major Fath stated that he understood that a civilian associate had told the agent of Food Service of Evansville, Inc., 10 days prior to the termination of the service that the services of the corporation would no longer be required.

In any event, it is clear that the termination of the service was not due to any dissatisfaction with the product or the service being rendered by the Food Service of Evansville, Inc. The sole motivation, according to Major Fath, was the conviction that the sandwiches could be made in the post exchange's own kitchens and sold at a cheaper price than the sandwiches purchased from Food Service of Evansville, Inc. However, the production of these sandwiches by the post exchange was discontinued a short time after the practice was initiated. The reason given for the discontinuance of the practice was the inability of the post exchange to fulfill the demand. Consequently, Major Fath, as post exchange officer, then entered into another oral agreement with one L. A. Ellis for the furnishing of the same type of service as that provided previously by Food Service of Evansville, Inc. This agreement was made with L. A. Ellis without the submission of bids for the service, although that was not the procedure when the agreement with the claimant was made.

As the result of the termination of the agreement with Major Fath, as post exchange officer for Camp Breckinridge, the corporation known as Food Service of Evansville, Inc., was faced with a large stock of perishable foods on its hands as well as the sandwich machines which they had furnished to the post exchange. The corporation was unable to dispose of their holdings or to secure new markets because of the abrupt notice of termination of their services. As a consequence

the corporation became hopelessly insolvent and was placed in receivership on January 13, 1951.

From the evidence presented to the committee, the committee believes that the service of the claimant was terminated without sufficient notice. The testimony related by Major Fath to the effect that a food supervisor gave 10 days' advance notice to the claimant is hearsay only. The person alleged to have made the remark did not testify and that information cannot, in the committee's mind, be given equal credence with the statement of the claimants' president, under oath, that he had no knowledge of the termination prior to the date it was to go into effect. Further, the House report characterizes the testimony of Major Fath before a House Judiciary subcommittee as evasive and the report also states that he failed to satisfy the subcommittee of the House Judiciary Committee as to his sincerity or fair dealing.

The Department of the Army in its report apparently seeks to justify this treatment of the claimant by characterizing the agreement between the claimant and Major Fath as a service-supply contract rather than a concession. The attempted differentiation does not excuse the arbitrary action of the post exchange officer in canceling the agreement without notice when he must have been aware of the severe hardship such action would impose on the claimant. The committee cannot condone such action without some evidence that the product or performance of the claimant was unsatisfactory. Even Major Fath admits that the performance of this claimant was satisfactory.

It is clear, as far as the committee is concerned, that there is no legal liability requiring the payment of this claim. However, the unnecessarily harsh treatment which this American organization has realized in dealing with this Army officer represents an injustice which the Congress may, to some extent, alleviate through the exercise of its authority to honor the moral obligations of the Government to wronged individuals. This authority was established in the case of *United States v. Realty Co.*, (163 U. S. 427). A quotation from that decision is pertinent here.

What are the debts of the United States within the meaning of the constitutional provision (art. I, sec. 8)? It is conceded and, indeed, it cannot be questioned, that the debts are not limited to those which are evidenced by some written obligation or those which are otherwise of a strictly legal character. The term "debts" includes those debts or claims which rest upon an equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The Nation, speaking broadly, owes a debt to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law.

While the losses suffered by this corporation approximate \$40,000, this bill awards only the sum of \$11,317.27 to the claimant for the losses which he has suffered. The committee believes that the claimant is entitled to this measure of compensation and it therefore recommends favorable consideration of this legislation.

Attached to this report are two affidavits of the president of this corporation and the report of the Department of the Army submitted in connection with this legislation. The hearings on this legislation are appended to the House report on this legislation and are hereby incorporated by reference.

AFFIDAVIT CONCERNING CLAIM OF FOOD SERVICE OF EVANSVILLE, INC.

STATE OF INDIANA,

County of Vanderburgh, ss:

Gerald R. Hocker, being first duly sworn upon his oath, deposes and says:

That he is president of Food Service of Evansville, Inc., an Indiana corporation; that the name of said corporation was formerly Kistler's Radar Sandwiches of Evansville, Inc.; and that the name of said corporation was changed by amendment of the articles of incorporation of said corporation in the year 1950.

Affiant further states that on or about August 21, 1950, he and one Mr. W. S. O'Nan conferred with Maj. L. M. Fath, post exchange officer at Camp Breckinridge, Ky., concerning the furnishing and selling of sandwiches by said corporation to the post exchanges at Camp Breckinridge; that said W. S. O'Nan was an agent and representative of said corporation with respect to the sandwich business of said corporation and was paid on a commission basis; and that the relationship of said W. S. O'Nan to said corporation and the fact that he was acting as representative and agent of said corporation was communicated by the undersigned and Mr. O'Nan to said Maj. L. M. Fath on or prior to August 21, 1950.

Affiant further states that in and during said conference of August 21, 1950, the undersigned, on behalf of said corporation, offered and agreed to supply sandwiches to said post exchanges, and Major Fath accepted said offer and agreed that said corporation should supply the total demand for sandwiches in the post exchanges at said camp. It was further agreed that the corporation furnish without cost to the camp or the post exchanges the first four radar sandwich machines required in connection with the dispensing of said sandwiches and that the post exchange should purchase the additional eight machines which would be required. At this same conference this affiant suggested and requested that a written contract be executed covering the above-mentioned agreement, to which suggestion Major Fath replied that the post exchange had not as yet set up its procedure for the issuance of written contracts and assured this affiant that the agreement would be performed without the necessity for a written contract.

Affiant further states that immediately following the above-mentioned conference and the making of the above-mentioned agreement said corporation provided the four radar sandwich machines which it was to furnish in accordance with said agreement, and thereafter the corporation proceeded to take and did take all necessary steps to equip and prepare itself to supply the sandwich demand, which Major Fath estimated would ultimately be approximately 15,000 sandwiches daily. The corporation did supply sandwiches to said post exchanges for a period of approximately 60 days following the date of the above-mentioned conference, but on October 18 the corporation was advised by a telephone call from Major Fath that the corporation's product and service was no longer required as of that date and that Major Fath had made arrangements for the preparation of sandwiches at the camp. Following this telephone message, an appeal was made by the officers of the corporation both to Major Fath and to Gen. C. E. Ryan, but Major Fath's decision was not altered and Food Service of Evansville, Inc., was not permitted to furnish and supply any additional sandwiches at the post exchanges. At that time the corporation offered to continue to provide sandwiches at cost without profit to it until such time as the food material which it had on hand was exhausted. This offer was declined and as hereinafter set forth a portion of the loss sustained by Food Service of Evansville, Inc., was in the form of food spoilage.

Affiant further states that at no time was there ever any complaint registered by Major Fath or by any other person on behalf of the post exchanges concerning the quality of the merchandise or service performed by said corporation, and that the only apparent reason for the sudden refusal of Major Fath to continue the contract with the corporation was his desire to attempt preparation of the sandwiches in the camp or post exchange kitchens.

Affiant further submits that the losses sustained by Food Service of Evansville, Inc., on account of the breach of said oral contract are in the amount of \$11,317.27 and are itemized as follows, to wit:

1. Distribution equipment, \$4,480 (25-percent loss)-----	\$1, 120. 00
1 1949 1-ton Dodge, Route-Van purchased for the sum of \$2,780 on Nov. 17, 1949, and under forced sale brought \$1,860. 1 1949 ½-ton Ford panel purchased Aug. 30, 1950, for \$1,700 by W. S. O'Nan, representative of the corporation in she State of Kentucky. He still has this truck in his possession. The loss sustained on the Dodge truck amounted to \$920 and the anticipated loss on the Ford truck \$200 minimum.	
2. Special dispensing equipment, \$2,227 (75-percent loss)-----	1, 670. 25
7 Multi-Chefs at a cost of \$300 each and 5 Rada-Chefs at a cost of \$25 each purchased for use by Camp Breckinridge. This equipment, because of its special nature, can be salvaged only at scrap value which has been determined at 25 percent of cost.	
3. Special cut, printed cellophane-----	1, 982. 00
This wrapping material has no salvageable value and cannot be used by any other business inasmuch as it was produced specifically for this product.	
4. Spoilage of finished product-----	750. 88
At the time that service was suddenly discontinued without notice at Camp Breckinridge, i. e., Oct. 17, there was on hand 605 dozen finished sandwiches for shipment at a production cost of \$1.242 per dozen.	
5. Spoilage of raw material-----	855. 50
The raw material on hand at the time of the above-stated interruption was as follows:	
111 loaves bread at \$0.25-----	\$29. 97
200 ½ dozen buns at \$0.18-----	36. 09
648 pounds fresh luncheon meat at \$0.45½-----	294. 84
320 pounds ground beef at \$0.56-----	179. 20
701 pounds wieners at \$0.45-----	315. 40
6. Production labor loss during 60-day service-----	1, 760. 00
This loss was suffered because of indirect labor pending full anticipated production.	
7. Training of new personnel-----	1, 150. 00
8. Trip cost to Breckinridge (42 trips 3,276 miles) (actual trips made at 14 cents per mile)-----	458. 64
9. Labor loss in setting up and servicing Breckinridge-----	1, 570. 00
Expense of paying promoters' wages and expenses in the original installation and servicing and training camp personnel in operating dispensing equipment.	
Total-----	11, 317. 27

Affiant further states that in reliance upon the contract outlined above all the facilities of Food Service of Evansville, Inc., were devoted exclusively to the preparation of sandwiches for distribution and sale at the Camp Breckinridge post exchanges; and that after the post exchanges refused to accept the production and services of Food Service of Evansville, Inc., said corporation had no outlet for its production, although as set forth above it had expended thousands of dollars in preparation for its performance of said contract, and as a consequence the corporation became hopelessly insolvent and was placed in receivership in the Superior Court of Vanderburgh County, Ind., on January 13, 1951, in cause No. B-9032 on the docket of said court.

Further affiant saith not.

GERALD R. HOCKER.

Subscribed and sworn to before me, the undersigned, a notary public within and for said county and State, this 24th day of January 1952.

[SEAL]

HELEN M. KAUZMAN,
Notary Public.

My commission expires October 11, 1954.

INSPECTOR GENERAL,
Camp Breckinridge, Ky.

(Attention: Lieutenant Colonel Kay.)

DECEMBER 29, 1950.

DEAR SIR: The undersigned hereby certifies that all statements contained in this document describing the loss sustained by Food Service of Evansville, Inc., in doing business with Camp Breckinridge are true and correct to the best of his knowledge and belief:

Said loss is itemized as follows:

1. Distribution equipment, \$4,480 (25 percent loss)-----	\$1, 120. 00
1 1949 Dodge 1-ton, Route Van, purchased for sum of \$2,780.	
1 1949 Ford, ½ ton, panel, purchased for sum of \$1,700.	
2. Special dispensing equipment, \$2,227 (75 percent loss)-----	1, 670. 25
7 Multi-Chefs were purchased at a cost of \$300 each; 5 Rada- Chefs at a cost of \$25.40 each for use at Camp Breckinridge. This equipment because of its special nature can be salvaged only at scrap value which has been determined at approximately 25 percent of cost.	
3. Special cut, printed cellophane-----	1, 982. 00
This wrapping material has no salvageable value and cannot be used by any other business, to my knowledge, inasmuch as it was produced special for this project.	
4. Spoilage of finished product-----	750. 88
At the time that service was suddenly discontinued without notice Oct 17, at Camp Breckinridge, we had 605 dozen finished sandwiches for shipment at a cost of \$1.242 per doz.	
5. Production labor loss during 60-day service-----	1, 760. 00
This loss was suffered because of indirect labor pending full anticipated production.	
6. Spoilage of raw material-----	855. 50
111 loaves bread, at \$0.27-----	\$29. 97
200 ½ dozen buns, at \$0.18-----	36. 09
648 pounds fresh lunch meat, at \$0.455-----	294. 84
320 pounds ground beef, at \$0.56-----	179. 20
701 pounds weiners, at \$0.45-----	315. 40
7. Training of new personnel (self-explanatory)-----	1, 150. 00
8. Trip cost to Breckinridge (42 trips, 3,276 miles)-----	458. 64
Actual trips made at 14 cents per mile.	
9. Loss in setting up and servicing Breckinridge-----	1, 570. 00
Labor and expenses of promotion in the original installation and servicing of Camp Breckinridge.	
Grand total-----	11, 317. 27

The undersigned appealed to Maj. L. M. Fath, post exchange officer, at Camp Breckinridge, Ky., to permit us to continue to produce sandwiches until the above material became exhausted under the agreement that Food Service of Evansville, Inc., provide sandwiches at cost with no profit involved in order to eliminate this tremendous waste. This proposal was ignored by Major Fath, portraying a very peculiar attitude in view of his statement to Gen. C. E. Ryan to the effect that our sandwiches and service were above reproach.

GERALD R. HOCKER,
President, Food Service of Evansville, Inc.

State of -----,

County of -----, ss:

In witness whereof I have hereunto affixed my official seal and signature this
----- day of ----- 19-----.

My commission expires -----.

-----,
Notary Public.

DEPARTMENT OF THE ARMY,
Washington, D. C., July 9, 1951.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CELLER: The Department of the Army is opposed to the enactment of H. R. 2405, Eighty-second Congress, a bill for the relief of Food Service of Evansville, Inc.

This bill would authorize and direct the Secretary of the Treasury to pay, out of any money in the Treasury not otherwise appropriated, the sum of \$11,317.27 to Food Service of Evansville, Inc., of Evansville, Ind., in full settlement of all claims against the United States for losses sustained as the result of an agreement with officers at Camp Breckinridge, Ky., to furnish equipment and supplies in the post exchanges at Camp Breckinridge, Ky.

On July 24, 1950, Camp Breckinridge, Ky., was reactivated by the Department of the Army as a training installation. While readying this camp for operation, a branch post exchange was established at Camp Breckinridge by the Fort Campbell, Ky., post exchange until such time as a regular exchange could be set up. On August 24, 1950, the Camp Breckinridge post exchange began operations and the branch exchange of Fort Campbell was closed.

Maj. Laurance M. Fath reported to the commanding officer, Camp Breckinridge, on August 7, 1950, and was assigned to duty as the post exchange officer. One of his first duties as post exchange officer was to hire a staff to assist him and to consider a number of applications for concessions in the post exchange. Because of the branch exchange being operated by the Fort Campbell post exchange, it was not necessary for Major Fath to make any commitments during the first 2 weeks he was at the post.

On August 5, 1950, Mr. William S. O'Nan of Morganfield, Ky., submitted a bid to the post exchange officer, Camp Breckinridge, requesting the sandwich concession for the various facilities at the post. This bid was presented on the letterhead of the O'Nan Electric Co., 107 East Main Street, Morganfield, Ky., in the name of the "O. K. Concessionaires, c/o O'Nan Electric Co.", and signed by Mr. O'Nan. Again on August 10, 1950, Mr. O'Nan under the title of "O. K. Concessionaires" wrote to Major Fath submitting a bid to sell "Radar Sandwiches" to the post exchange at Camp Breckinridge and offering to furnish the first four sandwich machines to the exchange without charge and to furnish the remaining machines at wholesale price.

Sometime during August 1950, Mr. William S. O'Nan of Morganfield, Ky., installed a sandwich machine in the main exchange building at Camp Breckinridge for the purpose of dispensing hot sandwiches. Later three sandwich machines were installed by Mr. O'Nan, in addition to the one installed in August 1950 and the one kept in reserve for service. Mr. O'Nan furnished sandwiches to the Camp Breckinridge post exchange from August 24, 1950, until November 17, 1950. The sandwiches were billed on sales slips of O'Nan's Lunch, Morganfield, Ky., or Kistler's Radar Sandwiches, Evansville, Ind., and were paid for by purchase orders on the Chicago regional office of the Army and Air Force Exchange Service. The purchase orders were executed by Major Fath. One was made payable to the Lea Foods, Inc., Evansville, and the others to Kistler Radar Sandwiches, Inc., Evansville, Ind. In November 1950 the post exchange decided that sandwiches could be made in its own kitchens and sold at a more reasonable price than sandwiches purchased from Mr. O'Nan. Accordingly, the post exchange notified Mr. O'Nan that it would cease to make purchases from him on November 17, 1950. It does not appear that Mr. O'Nan recalls being given advance notice to stop furnishing sandwiches to the post exchange, and Major Fath does not recall giving advance notice. However, Mr. Robert W. Varner, who was food supervisor for the Camp Breckinridge post exchanges from September 20, 1950, until December 3, 1950, states that on or about November 7, 1950, he told Mr. O'Nan that the exchange was going to stop using his sandwiches.

It appears that Major Fath understood that sandwiches were being furnished on a day-to-day basis, but Mr. O'Nan believed that he had an oral contract of an indefinite term to furnish sandwiches. Mr. O'Nan states that Major Fath agreed that the sandwich service was very desirable and that because there would be no competition the corporation should make some consideration in the purchase of the necessary equipment. It was on the strength of this conversation that the first four machines were installed without charge to the exchange. Major Fath told Mr. O'Nan that no contract was being issued at that time to anyone and that when contracts were issued they would have to come out of the Chicago office. Mr. Gerald R. Hocker, president of Food Service of Evansville, Inc., understood the agreement with the post exchange to be as stated by Mr. O'Nan.

Food Service of Evansville, Inc., was incorporated in July 1947 for the purpose of furnishing sandwiches and other items of food to snack bars, drive-ins, private parties, or for industrial plant feeding. Mr. O'Nan was the representative of the corporation in the State of Kentucky. When Mr. O'Nan notified Food Service of Evansville, Inc., that he had an agreement to furnish sandwiches to the Camp Breckinridge exchange, all regular activities of the corporation were stopped as it intended to devote the entire output of sandwiches for the service of the exchange. This corporation was the franchise agent for "Radar Sandwiches" (a trade name) for Indiana and Kentucky and had furnished sandwiches to Camp Breckinridge during 1947 and 1948. The true relationship of Mr. O'Nan as an agent of the Food Service of Evansville, Inc., was not known by any officers at the camp until the latter part of November 1950. Until that time it was thought by the staff of the post exchange that Mr. O'Nan was a middleman who purchased the sandwiches from a concern in Evansville and sold them to the post exchange.

taking in return a small profit. This belief was supported by the fact that Mr. O'Nan, for a short time, sold pies to the exchange on such a basis.

The sum of \$11,317.27 which would be paid to Food Service of Evansville, Inc., were this bill to be enacted by the Congress, represents the loss which said corporation alleges it sustained because of the cancellation of the alleged contract between such corporation and the Camp Breckinridge exchange. Such loss is itemized as follows:

Distribution equipment (2 trucks at 25 percent loss)-----	\$1, 120. 00
Special dispensing equipment (75 percent loss)-----	1, 670. 25
Special printed cellophane-----	1, 982. 00
Spoilage of sandwiches-----	750. 88
Production labor loss during period Aug. 24, 1950 to Nov. 17, 1950--	1, 760. 00
Spoilage of raw material-----	855. 50
Training of new personnel-----	1, 150. 00
Cost of trips to Camp Breckinridge-----	458. 64
Labor and expenses of promotion for original installation and service of the exchange-----	1, 570. 00
Total-----	11, 317. 27

Special Regulations 60-10-1, dated May 12, 1950, published by the Department of the Army, provide, in pertinent part, as follows:

"b. Only the standard form concession contract prescribed by the Chief, Army and Air Force Exchange Service, will be executed between the exchange and each concessionaire. The contract, in addition to such other provisions as may be prescribed, will provide—

"(1) That the installation commander will retain supervision over the activity and approval of prices to be charged.

"(2) The express provision that the concessionaire assume complete liability for all taxes applicable to the property, income, and transactions of the concessionaire.

"(3) For the payment of commissions to the exchange at a percentage rate of gross concession sales.

"(4) That the concessionaire will maintain adequate insurance coverage as prescribed by the Army and Air Force Exchange Service.

"(5) That the contract shall not become effective without the approval of the installation commander and the concurrence of the Chief, Army and Air Force Exchange Service, as evidenced by their respective signatures thereto or the signatures of their authorized representatives."

It does not appear that Food Service of Evansville has ever brought this matter to the attention of the Army and Air Force Exchange Service, which is the appropriate military authority to consider administratively claims of this nature.

In the instant case Major Fath was not authorized to make a contract for concessions at the Camp Breckinridge exchange which would obligate either the Army and Air Force Exchange Service or the exchange. Under Special Regulations 60-10-1, supra, contracts for concessions are specifically required to be made upon the standard form concession contract prescribed by the Chief of the Exchange Service and any such contract is effective only when approved by the installation commander with the concurrence of the Chief of the Army and Air Force Exchange Service. The alleged concession agreement between Food Service of Evansville, Inc., and the officers at Camp Breckinridge did not meet these requirements, and, accordingly, no binding contract could result.

The evidence of record in this case does not support the contention of Food Service of Evansville that there was a contract of an indefinite duration to supply sandwiches to the Camp Breckinridge post exchange. The evidence shows that the sandwiches were furnished to the exchange only on a day-to-day basis which could be terminated at any time. The evidence further shows that Major Fath notified the agent of Food Service of Evansville, Ind., that all contracts had to come out of the Chicago office of the Army and Air Force Exchange Service, which fact placed Food Service of Evansville on notice that their sandwiches were not being purchased by the Camp Breckinridge post exchange on a permanent basis. Accordingly, there is no justifiable basis, either in law or in equity, for the granting of the award proposed by H. R. 2405. The Department of the Army therefore, recommends that this bill be not favorably considered by the Congress.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

FRANK PACE, Jr.,
Secretary of the Army.